I. Revisions to Chapter 1 of the Guide, ``Overview of Accident/Incident Reporting and Recordkeeping Requirements'

Proposal

Chapter 1 of the Guide was revised to reflect the major changes to part 225 and the rest of the Guide, such as important definitions, the revision of the telephonic reporting requirement, and the revision of the reportability criteria in Sec. 225.19(d). In addition, Chapter 1 has been revised to change the closeout date for the reporting year. Under FRA's reporting requirements, in effect since 1997, railroads were permitted until April 15 to close out their accident/incident records for the previous reporting year. 1997 Guide, Ch. 1, p. 11. FRA has amended its Guide to extend the deadline for completing such accident/incident reporting records until December 1, and will extend the deadline even beyond that date on a case-by-case basis for individual records or cases, if warranted.

Comments and Final Rule/Decision

Comments received will be discussed in context with the issues as stated elsewhere in this preamble.

J. Revisions to Chapter 6 of the Guide, Pertaining to Form FRA F 6180.55a, ``Railroad Injury and Illness Summary (Continuation Sheet)"

FRA has amended its Guide to bring it, for the most part, into conformity with OSHA's recently published Final Rule on recordkeeping and reporting. The Working Group also wanted to make it clear, by noting in Chapter 6, that railroads are not required to report occupational fatalities, injuries, and illnesses to OSHA if FRA and OSHA have entered into an MOU that so provides.

Under OSHA's Final Rule, reporting requirements have changed in many ways, several of which are described below. See also Sec. 225.39 regarding FRA's treatment of cases reportable under proposed part 225 solely because of, e.g., recommended days away from work that are not actually taken.

1. Changes in How Days Away from Work and Days of Restricted Work Are Counted

Proposal

Under OSHA's Final Rule, if a doctor orders a patient to rest and not return to work for a number of days, or recommends that an employee engage only in restricted work, for purposes of reporting days away from work or restricted work, an employer must report the actual number of days that the employee was ordered not to return to work or ordered to restrict the type of work performed, even if the employee decides to ignore the doctor's orders by opting to return to work or to work without restriction. Specifically, under OSHA's Final Rule,

If a physician or other licensed health care professional recommends days away, you should encourage your employee to follow that recommendation. However, the days away must be recorded whether the injured or ill employee follows the physician or licensed health care professional's recommendation or not.

29 CFR 1904.7(b)(3)(ii). FRA agrees with the position taken by OSHA, that the employee should be encouraged to follow the doctor's advice about not reporting to work and/or taking restricted time to allow the employee to heal from the injury.

OSHA states a similar rule with respect to reporting the number of days of recommended restricted duty. Specifically, OSHA's final rule states,

May I stop counting days if an employee who is away from work because of an injury or illness retires or leaves my company? Yes, if the employee leaves your company for some reason unrelated to the injury or illness, such as retirement, a plant closing, or to take another job, you may stop counting days away from work or days of restricted/job transfer. If the employee leaves your company because of the injury or illness, you must estimate the number of days away or days of restriction/job transfer and enter the day count on the 300 Log.

29 CFR 1904.7(b)(3)(viii). In contrast, under FRA's 1997 Guide, a railroad was only required to report the actual number of days that the

employee did not return to work or was on restricted work duty due to a work-related injury or illness: ``A record of the actual count of these days must be maintained for the affected employee.'' See 1997 Guide, Ch. 6, pp. 13-14.

There was much discussion at the Working Group meetings as to whether FRA should conform to OSHA's final rule with respect to reporting the number of days away from work or number of days of restricted duty. Some Working Group members wanted to leave FRA's current reporting system in place, while others saw merit in OSHA's approach. FRA representatives met with OSHA representatives to address this issue. OSHA insisted that since it tracks an index of the severity of injuries, with days away from work being the most severe non-fatal injuries and illnesses, it was important to OSHA to maintain a uniform database and have those types of injuries captured in its statistics.

A compromise was reached on the issue of reporting the number of days away and number of days of restricted work activity that was acceptable both to the Working Group and, preliminarily, to OSHA. Specifically, FRA proposed that if no other reporting criteria apply but a doctor orders a patient to rest and not to report to work for a number of days because of a work-related injury or illness, the railroad must report the case under a special category called ``covered data.'' The Guide would explain how this covered data would be coded. The principal purpose of collecting covered data is so that this information can be provided to DOL for inter-industry comparison. The general rule is as follows: Where a doctor orders days of rest for an employee because of a work-related injury or illness, the railroad must report the resulting actual days away from work unless the employee misses no days of work because of the injury or illness, in which case, the railroad must report one day. Note: If the employee takes more days than the doctor ordered, the railroad must still report actual days away from work unless the railroad can show that the employee should have returned to work sooner. The following examples illustrate the application of this principle in combination with existing requirements that would be carried forward.

[sbull] If the doctor orders the patient to five days of rest, and the employee reports to work the next day and takes no other days off as a result of the injury or illness, the railroad must report one day

away from work. (This case would be separately coded and not included in FRA accident/incident aggregate statistics.)

[sbull] If, on the other hand, the employee takes three days of rest, when the doctor ordered five days of rest, then the railroad must report the actual number of days away from work as three days away from work.

[sbull] Of course, if the doctor orders five days of rest and the employee takes five days of rest, then the railroad must report the full five days away from work.

[sbull] Finally, if the doctor orders five days of rest, and the employee takes more than the five days ordered, then the railroad must report the actual number of days away from work, unless the railroad can show that the employee should have returned to work sooner than the employee actually did.

FRA noted that it may be appropriate to take into consideration special circumstances in determining the appropriate reporting system for the railroad industry. While compensation for injuries and illnesses in most industries is determined under state-level worker compensation systems, which provide recovery on a ``no-fault'' basis with fixed benefits, railroad claims departments generally compensate railroad employees for lost workdays resulting from injuries or occupational illnesses. In the event a railroad employee is not satisfied with the level of compensation offered by the railroad, the injured or ill employee may seek relief under FELA (Federal Employer's Liability Act), which is a fault-based system and subject to full recovery for compensatory damages. Further, railroad employees generally are subject to a federally-administered sickness program, which provides benefits less generous than under some private sector plans. Although it is not readily apparent in any quantitative sense how this combination of factors influences actual practices with respect to medical advice provided and employee decisions to return to work, clearly the external stimuli are different than one would expect to be found in a typical workplace. Accordingly, it seemed appropriate that the Working Group found it wise to recommend that FRA adopt a compromise approach that blends the new OSHA approach with the traditional emphasis on actual outcomes. The approach described above will foster continuity in rail accident/incident trend analysis while permitting inter-industry comparability, as well.

Comments

In its comments, AAR sought clarification as to whether the same principles that applied to counting days away from work applied to counting days of restricted work. AAR also commented that the Guide needed to be clearer in its discussion of covered data. At the post-NPRM Working Group meeting, FRA confirmed that the same principles that applied to counting days away from work would also apply to counting days of restricted work and vice versa.

Final Rule/Decision

With some slight modifications in accordance with AAR's request for greater clarity, FRA has adopted the proposed method for counting days away from work and days of restricted work. FRA will address the slight variations on this issue in its MOU with OSHA.

2. Changes in the ``Cap'' on Days Away From Work and Days Restricted; Including All Calendar Days in the Count of Days Away From Work and Days of Restricted Work Activity

Proposal

In addition, to conform to OSHA's Final Rule, FRA proposed amendments to its Guide that lower the maximum number of days away or days of restricted work activity that must be reported, from 365 days to 180 days, and change the method of counting days away from work and days of restricted work activity. The Working Group noted that counting calendar days is administratively simpler for employers than counting scheduled days of work that are missed. Using this simpler method of counting days away from work provides employers who keep records some relief from the complexities of counting days away from work under FRA's former system. Moreover, the calendar day approach makes it easier to compare an injury/illness date with a return-to-work date and to compute the difference between those two dates. The calendar method also facilitates computerized day counts. In addition, calendar day counts are a better measure of severity, because they are based on the length of disability instead of being dependent on the individual employee's work schedule. Accordingly, FRA proposed to adopt OSHA's approach of counting calendar days because this approach was easier than the former system and provided a more accurate and consistent measure of disability duration resulting from occupational injury and illness and thus would generate more reliable data. Under FRA's 1997

Guide, days away from work and days of restricted work activity were counted only if the employee was scheduled to work on those days. In the 2003 Guide, because it is a preferred approach, and to be consistent with OSHA's Final Rule, days away from work includes all calendar days, even a Saturday, Sunday, holiday, vacation day, or other day off, after the day of the injury and before the employee reports to work, even if the employee was not scheduled to work on those days.

Comments

Although there were no specific comments directly related to the proposed 180-day cap amendment, there was a comment with respect to an alleged disparity between the time period of the proposed cap and the time period of a pre-existing requirement for updating reports. AAR commented that there was a disparity between the proposed Guide's discussion of updating reports and the discussion that took place in the RSAC meetings. The proposed Guide stated that railroads were required to monitor employee illnesses and injuries for 180 days after the occurrence of the injury or the diagnosis of the illness and update accident/incident reports during that period. See Question and Answer No. 91 in the proposed Guide, Ch. 6, pp. 34-35. AAR concluded that this policy was inconsistent with FRA's requirement that a railroad file late reports for up to five years after the end of the calendar year to which the reports relate. See proposed Guide, Ch. 1, p. 12. It appears there was some confusion on what had actually been agreed upon related to this comment and the difference in the requirement to update an injury versus an occupational illness, since occupational illnesses become reportable on the date of diagnosis.

At the post-NPRM meeting, FRA explained that the requirements were not inconsistent. There is a difference between monitoring (for 180 days) an illness or injury about which the railroad had prior knowledge, or already reported or listed as an accountable, versus having to file a late report for injuries or illnesses that were never reported in any form but should have been. With respect to the cases being monitored, the five-year reporting obligation would only hold the railroad responsible for failing to report a change in an employee's illness or injury that occurred within the 180-day monitoring period. Thus, if a change occurred on the 180th day, and the railroad did not discover its error in failing to report until two years later, an obligation to file a late report would still exist, but if a change

occurred on the 181st day, the railroad is no longer under an obligation to actively monitor or investigate the case and would not be held accountable for failing to report such a change one day, one year, or five years later. If a railroad is provided with information or documentation of consequences that the employee claims is related to an injury that occurred more than 180 days ago, the railroad would have to handle the injury as it would a new case.

Final Rule/Decision

FRA has adopted the 180-day cap as proposed. The new cap reflects Working Group agreement that reportable and accountable injuries are tracked for 180 days from the date of the incident. However, if an injury becomes reportable during that monitoring/tracking period, the carrier will report it when it becomes known, even after the 180 days. This approach differs slightly from OSHA's approach, which appears to require an employer to continue counting days until the 180-day maximum is reached, regardless of whether those days were consecutive or intermittent. Thus, an employer may have to monitor or track an injury for more than 180 days. In contrast, FRA's cap of 180 days will only be reached if the employee misses those days consecutively. It has generally been FRA's experience that a reportable injury will meet one or more of the general reportability criteria within the 180-day time frame and that only a few cases continue to result in missed days beyond this time frame. Additionally, this difference would not likely have a substantial effect on the data for purposes of OSHA's severity index, since under that index 120 days away from work missed intermittently over a 180-day period would be comparable in severity to 180 days missed consecutively, or 180 days missed intermittently over a two-year period. Thus, FRA has concluded that the burden on the employer of having to monitor a case for as long a period as necessary to compile 180 days away from work outweighs the benefit of capturing more days in a few cases by adopting an intermittent 180-day cap.

FRA has added to the 2003 Guide an explanation of the difference in occupational illness reporting versus injury and has clarified the discussion concerning the required time period for monitoring and how it relates to updating reports. FRA will address the differences in the 180-day cap in its MOU with OSHA.

3. Definitions of ``Medical Treatment'' and ``First Aid''

Proposal

FRA's 1997 Guide indicated what constituted ``medical treatment'' and what constituted ``first aid'' and how to categorize other kinds of treatment. See 1997 Guide, Ch. 6, pp. 6-9. As stated in the 1997 Guide, ``medical treatment'' rendered an injury reportable. If an injury or illness required only ``first aid,'' the injury was not reportable, but was, instead, accountable. Under OSHA's final rule, a list is provided of what constitutes ``first aid.'' 29 CFR 1904.7(b)(5). If a particular procedure is not included on that list, and does not fit into one of the two categories of treatments that are expressly defined as not medical treatment (diagnostic procedures and visits for observation or counseling), then the procedure is considered to be ``medical treatment.'' Id. FRA proposed to amend its regulations and Guide to conform to OSHA's definition and new method of categorizing what constitutes medical treatment and first aid. Specifically, FRA proposed to amend its regulations and the Guide to address the following four items:

a. Counseling. Under FRA's ``definitions'' section of its regulations,

* * * Medical treatment also does not include preventive emotional trauma counseling provided by the railroad's employee counseling and assistance officer unless the participating worker has been diagnosed as having a mental disorder that was significantly caused or aggravated by an accident/incident and this condition requires a regimen of treatment to correct.

See Sec. 225.5. In contrast, under OSHA's final rule, ``medical treatment does not include: (A) Visits to a physician or other licensed health care professional solely for observation or counseling. * * *'' Emphasis added. See 29 CFR 1904.7(b)(5)(i). Accordingly, to conform to OSHA's final rule, FRA proposed to amend its definition of ``medical treatment'' to exclude counseling as a type of medical treatment. See proposed Sec. 225.5.

b. Eye patches, butterfly bandages, Steri-Strips™, and similar items. Under FRA's 1997 Guide, use of an eye patch, butterfly bandage, Steri-Strip™, or similar item was considered

medical treatment, rendering the injury reportable. Under OSHA's final rule, however, use of an eye patch, butterfly bandage, or Steri-Strip™ is considered to be first aid and, therefore, not reportable. In order to conform FRA's Guide to OSHA's Final Rule, FRA proposed to amend the Guide so that use of an eye patch, butterfly bandage, or Steri-Strip™ would be considered first aid.

c. Immobilization of a body part. Under FRA's 1997 Guide, immobilization of a body part for transport purposes was considered medical treatment. Given, however, that OSHA's final rule considers immobilization of a body part for transport to be first aid, FRA proposed to amend its Guide so that immobilization of a body part solely for purposes of transport would be considered first aid.

d. Prescription versus non-prescription medication. Under FRA's 1997 Guide, a doctor's order to take over-the-counter medication was not considered medical treatment even if a doctor ordered a dosage of the over-the-counter medication at prescription strength. Under OSHA's final rule, however, a doctor's order to take over-the-counter medication at prescription strength is considered medical treatment rather than first aid. For example, under OSHA's final rule, if a doctor orders a patient to take simultaneously three 200 mg. tablets of over-the-counter Ibuprofen, this case would be reportable, since 467 mg. of Ibuprofen is considered to be prescription strength.

The Working Group struggled with this issue. On the one hand, it is a legitimate concern that reportability not be manipulated by encouraging occupational clinics to substitute a non-prescription medication when a prescription medication is indicated. That result, however, may be more humane than a circumstance in which the medical provider is wrongly encouraged not to order an appropriate dosage.

Further, in some cases, physicians may direct the use of patent medicines simply to save the employee the time of filling a prescription or simply to hold down costs to the insurer. Also, the physician may find the over-the-counter preparation to be more suitable in terms of formulation, including rate of release and absorption.

As in the case of recommended days away from work not taken (discussed above), the Working Group settled on recommending a compromise position. Where the treating health care professional directs in writing the use of a non-prescription medication at a dose

equal to or greater than that of the minimum amount typically prescribed, and no other reporting criterion applies, the railroad would report this as a special case (``covered data'' under Sec. Sec. 225.5 and 225.39). FRA explored whether it was practical to add to Chapter 6 of the 2003 Guide, a list of commonly used over-the-counter medications, including the prescription strength for those medications. FRA has concluded that this list would be helpful to the regulated community; thus, a list of over-the-counter medications that conforms to OSHA's published standards has been added to Chapter 6. If OSHA revises its list of over-the-counter medications in the future, the revised list will be posted on FRA's Web site at http://safetydata.fra.dot.gov/guide.

As covered data, the case would be included in aggregate data provided to DOL, but would not be included in FRA's periodic statistical summaries. FRA would have the data available to reference, and if a pattern of apparent abuse emerged, FRA could examine both the working conditions in question and also review possible further amendments to these reporting regulations.

Comments and Final Rule/Decision

No specific comments were received concerning the above-proposed changes to the definitions of ``medical treatment'' and ``first aid.'' For the reasons stated above, the changes have been adopted as proposed. However, the issue was raised with respect to the classification of the administration of oxygen and one-time dosages of prescription medication. These issues were resolved by FRA, and the provisions have been amended accordingly. For a more detailed discussion, please see section ``III.H.'' of the preamble, above.

K. Revisions to Chapter 7 of the Guide, ``Rail Equipment Accident/Incident Report''

Proposal

To allow for better analysis of railroad accident data, FRA proposed to amend Chapter 7 of the Guide to include the new codes for remote control locomotive operations, and for reporting the location of a rail equipment accident/incident using longitude and latitude variables. See also sections ``III.M.'' and ``III.P.1.'' of the preamble, below.

Comments and Final Rule/Decision

No specific comments were received. For the reasons stated above, the amendments have been adopted as proposed.

L. New Chapter 12 of the Guide on Reporting by Commuter Railroads

Proposal

FRA has been faced with a number of commuter rail service reporting issues. For example, in reviewing accident/incident data using automated processing routines, FRA could not distinguish Amtrak's commuter activities from its intercity service, and could not always distinguish between a commuter railroad that ran part of its operation and contracted for another part of its operation with a freight railroad. FRA developed alternative strategies with the affected railroads for collecting these data to ensure that commuter rail operations accurately reflected the entire scope of operations, yet did not increase the burden of reporting for affected railroads. This issue also arose in the context of an NTSB Safety Recommendation, R-97-11, following NTSB's investigation of a collision on February 16, 1996, in Silver Spring, Maryland, between an Amtrak passenger train and a MARC commuter train. During the accident investigation, NTSB requested from FRA a five-year accident history for commuter railroad operations. FRA was not, however, able to provide a composite accident history for some of the commuter railroad operations because they were operated under contract with Amtrak and other freight railroads, and the accident data for some commuter railroads were commingled with the data of Amtrak and the other contracted freight railroads. Accordingly, NTSB's Safety Recommendation R-97-11 addressed to FRA read as follows: ``Develop and maintain separate identifiable data records for commuter and intercity rail passenger operations.''

When RSAC Task Statement 2001-1 was presented, FRA determined that a new chapter in the Guide was needed to address NTSB's and FRA's concerns regarding commuter railroad reporting. At the initial May 2001 meeting, FRA representatives presented the issue to the Working Group. FRA representatives were tasked to develop a chapter specifically dealing with commuter rail reporting. In the August 2001 Working Group meeting, FRA presented a draft of the new chapter. A task group was

formed that included representatives of Amtrak, Metra, APTA, and FRA. The new Chapter 12 was presented in November of 2001 to the entire Working Group, and the Working Group accepted the chapter in its entirety.

Comments and Final Rule/Decision

No specific comments were received. For the reasons stated above, Chapter 12 has been adopted as proposed.

M. Changes in Reporting of Accidents/Incidents Involving Remote Control Locomotives

Proposal

An FRA notice entitled, ``Notification of Modification of Information Collection Requirements on Remote Control Locomotives,'' stated that the Special Study Blocks on the rail equipment accident report and highway-rail crossing report, as well as special codes in the narrative section of the ``Injury and Illness Summary Report (Continuation Sheet),'' were for only temporary use until part 225 and the Guide were amended. 65 FR 79915, Dec. 20, 2000. At the November 2001 Working Group meeting, some members raised the issue of addressing this statement in FRA's notice and the need to craft regular means for reporting accidents/incidents involving remote control locomotives (RCL). In response, a special task group was formed to study the reporting of RCL-related rail equipment accidents, highway-rail crashes, and casualties.

In December of 2001, the task group initially decided to recommend modifying the ``Rail Equipment Accident/Incident Report Form'' (FRA F 6180.54) and the ``Highway-Rail Grade Crossing Accident/Incident Report Form'' (FRA F 6180.57) to add an additional block to capture RCL operations, but the task group was not able to reach consensus on the ``Injury and Illness Summary Report (Continuation Sheet)'' (FRA F 6180.55a).

Railroad representatives were concerned about modifying the accident/incident database with additional data elements. The FRA representatives proposed a new, modified coding scheme that utilized the Probable Reason for Injury/Illness Code field in the set of

Circumstance Codes and also included some additional Event Codes and two special Job Codes.

During a subsequent Working Group meeting, a new element was added as Item 30a, ``Remote Control Locomotive,'' on the ``Rail Equipment Accident/Incident Report'' form to allow entry of one of four possible values:

``0''--Not a remotely controlled operation;

``1''--Remote control portable transmitter;

``2''--Remote control tower operation; and

``3''--Remote control portable transmitter--more than one remote control transmitter.

For the ``Highway-Rail Grade Crossing Accident/Incident Report'' form to capture RCL operations, the ``Rail Equipment Involved'' block was modified to add three additional values:

``A''--Train pulling--RCL;

``B''--Train pushing--RCL; and

``C''--Train standing--RCL.

These recommendations were accepted by the Working Group, as well as the changes in the Job Codes and Circumstance Codes for the ``Injury and Illness Summary Report (Continuation Sheet).''

Comments and Final Rule/Decision

No specific comments were received regarding the changes in the reporting of accidents/incidents involving remote control locomotives. The amendments have been adopted as proposed. See also discussion concerning changes in Circumstance Codes in section ``III.N.'' of this preamble, below.

N. Changes in Circumstance Codes (Appendix F of the Guide)

Prior to 1997, the ``Injury and Illness Summary Report (Continuation Sheet)'' contained a field called ``Occurrence Code.'' The field attempted to describe what the injured or ill person was doing at the time he or she was injured or became ill. Often the action of the individual was the same, but the equipment involved was different, so a different Occurrence Code was needed for each

situation, e.g., getting off locomotive, getting off freight car, getting off passenger car. Another problem with the Occurrence Code was that the code did not provide the information necessary to explain the incident, e.g., if the injury was electric shock, the Occurrence Code was ``using hand held tools,'' so FRA could not tell from the report if the electrical shock was from the hand tool, the third rail, lightning, or drilling into a live electric wire.

To address these concerns, the Occurrence Code field was replaced in 1997 with the Circumstance Code field. The change allowed for more flexibility in describing what the person was doing when injured or made ill. Under the broad category of Circumstance Codes, FRA had developed five subsets of codes: Physical Act; Location; Event; Tools, Machinery, Appliances, Structures, Surfaces (etc.); and Probable Reason for Injury/Illness.

During the next five years, FRA and the railroad reporting officers realized that there were still gaps in the codes. FRA proposed expanding the list of Circumstance Codes and determined that some injuries and fatalities should always be reported using a narrative. Also, some Circumstance Codes required the use of narratives. At the July 2001 Working Group meeting, the railroads noted that expanded Circumstance Codes would assist in reporting and analysis. FRA asked the railroads to provide an expanded list of Circumstance Codes for the next meeting, with the understanding that a narrative would be required when the codes did not adequately describe the incident. By the September 2001 meeting, the railroads had produced many new codes, which FRA compiled and presented at the November 2001 meeting. At that meeting, rail labor representatives discussed RCL reporting. In the January 2002 Working Group meeting, the members reviewed the compiled list, including the special RCL codes. The Working Group made recommendations to move some of the codes to other areas. At the March 2002 Working Group meeting, a task group was formed to resolve the remaining issues with respect to codes. Specifically, the Working Group started by referring to proposed codes that pertained to switching operations. These codes were Probable Reason codes that came out of a separate FRA Working Group on Switching Operations Fatality Analysis

(SOFA). The task group revised the SOFA codes and added them to Appendix F. The entire Working Group then reviewed and voted to approve all of the task force's proposed codes.

Comments and Final Rule/Decision

Although no specific comments were received with respect to Circumstance Codes during the comment period, FRA was later alerted to several errors in the Circumstance Codes by a representative of BNSF. A copy of BNSF e-mails concerning Circumstance codes have been placed in the docket. The proposed Guide did not reflect the codes as updated by a 1997 FRA memo. Accordingly, other than the edits incorporating the codes from the 1997 memo into Appendix F of the 2003 Guide, FRA has adopted the amendments to the codes as proposed.

O. Changes in Three Forms (Appendix H of the Guide)

Proposal

The Working Group converted the Form FRA F 6180.78, ``Notice to Railroad Employee Involved in Rail Equipment Accident/Incident Attributed to Employee Human Factor [and] Employee Statement Supplementing Railroad Accident Report,'' and Form FRA F 6180.81, ``Employee Human Factor Attachment'' to question-and-answer format, and simplified the language so that they are easier to understand. One issue raised was whether a specific warning related to criminal liability for falsifying the form should be included on the form. Some Working Group members believed that a warning would only serve to intimidate employees from filling out the form. FRA noted that it was important to put the warning on the form to deter employees from falsifying information on the forms. FRA also noted that the same warning would be included on the form for reporting officers. In deference to the fact that rail labor representatives felt strongly that the language was too intimidating, it was agreed that a general warning would be included on the back of the form, which would not specifically state the penalties for falsifying information on the form. In addition, the Working Group agreed to modification of Form FRA F 6180.98 to include an item for the county in which the accident/incident occurred.

Comments and Final Rule/Decision

No specific comments were received. For the reasons stated above, the amendments have been adopted as proposed.

P. Miscellaneous Issues Regarding Part 225 or the Guide

1. Longitude and Latitude Blocks for Two Forms

Proposal

Following discussion of this issue, the Working Group agreed that provision could be made for voluntarily reporting the latitude and longitude of a rail equipment accident/incident, a trespasser incident, and an employee fatality. FRA proposed to add blocks to Form FRA F 6180.54 and Form FRA F 6180.55a for this information. The reason FRA is seeking to gather this information is to better determine if there is a pattern in the location of certain rail equipment accidents/incidents, trespasser incidents, and employee fatalities. Geographic information systems under development in the public and private sectors provide an increasingly capable means of organizing information. Railroads are mapping their route systems, and increasingly accurate and affordable Global Positioning System (GPS) receivers are available and in widespread use.

Comments and Final Rule/Decision

No specific comments were received. For the reasons stated above, the blocks have been adopted as proposed.

2. Train Accident Cause Code ``Under Investigation'' (Appendix C of the Guide)

Proposal

One of the tasks addressed by the Working Group was to define ``under investigation,'' as that term is used in Cause Code M505, ``Cause under investigation (Corrected report will be forwarded at a later date),'' and to put that definition in Chapter 7 of the Guide under subpart C, ``Instructions for Completing Form FRA F 6180.54,'' block 38, ``Primary Cause Code'' and Appendix C of the Guide. Currently, many accidents/incidents of a significant nature, e.g., ones that are involved in private litigation for many years, are coded as ``under investigation.'' Even if FRA and the railroad think that they know the primary cause of an accident, some railroads will not assign a specific cause code to the accident, either for liability reasons, or

because the railroad or a local jurisdiction (or some other authority) is still investigating the accident.

To provide finality to the process of investigating an accident/incident, the Working Group agreed that ``under investigation'' would mean under active investigation by the railroad. When the railroad has completed its own investigation and received all laboratory results, the railroad must make a ``good faith'' determination of the primary cause of the accident, any contributing causes, and their proper codes. The railroad must not wait for FRA or NTSB to complete their investigations before assigning the most applicable cause code(s) available. After FRA or NTSB completes its investigation, the railroad may choose to amend the cause code on the accident report. Accordingly, FRA proposed to revise the Guide to demonstrate that the meaning of the cause code in question has been changed to ``Cause under active investigation by reporting railroad (Amended report will be forwarded when reporting railroad's active investigation has been completed).''

In addition, the Working Group agreed to add a new code ``M507'' to denote accidents/incidents in which the investigation is complete but the cause of the accident/incident could not be determined. If a railroad uses this code, the railroad is required to include in the narrative block an explanation for why the cause of the accident/incident could not be determined.

Comments and Final Rule/Decision

No specific comments were received. For the reasons stated above, the amendments have been adopted as proposed.

3. ``Most Authoritative'': Determining Work-Relatedness and Other Aspects of Reportability

Proposal

The duty to report work-related illnesses under the current rule has occasioned concern and disagreement about not only whether an illness exists, but, more importantly and more controversially, whether the illness is work-related. Often an employee's doctor's opinion is that an employee's illness is work-related, while the railroad's doctor's opinion is that the illness is not work-related. In providing guidance as to how a reporting officer determines whether an illness is work-related, OSHA's final rule states,

[the employer] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Sec. 1904.5(b)(2) applies.

29 CFR 1904.5(a). In addition, the preamble to OSHA's final rule states,

Accordingly, OSHA has concluded that the determination of work-relatedness is best made by the employer, as it has been in the past. Employers are in the best position to obtain the information, both from the employee and the workplace, that is necessary to make this determination. Although expert advice may occasionally be sought by employers in particularly complex cases, the final rule provides that the determination of work-relatedness ultimately rests with the employer.

66 FR 5950.

Following publication of this final rule, the National Association of Manufacturers (NAM) filed a First Amended Complaint challenging portions of the final rule. As part of the NAM-OSHA settlement agreement, published in the Federal Register, the parties agreed to the following:

Under this language [29 CFR 1904.5(a)], a case is presumed work-related if, and only if, an event or exposure in the work environment is a discernable cause of the injury or illness or of a significant aggravation to pre-existing condition. The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause.

Section 1904.5(b)(2) states that a case is not recordable if it ``involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the

work environment." This language is intended as a restatement of the principle expressed in 1904.5(a), described above. Regardless of where signs or symptoms surface, a case is recordable only if a work event or exposure is a discernable cause of the injury or illness or of a significant aggravation to a pre-existing condition.

Section 1904.5(b)(3) states that if it is not obvious whether the precipitating event or exposure occurred in the work environment or elsewhere, the employer ``must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment caused or contributed to the resulting condition or significantly aggravated a pre-existing condition.'' This means that the employer must make a determination whether it is more likely than not that work events or exposures were a cause of the injury or illness, or a significant aggravation to a pre-existing condition. If the employer decides the case is not work-related, and OSHA subsequently issues a citation for failure to record, the Government would have the burden of proving that the injury or illness was work-related.

(Emphasis added.) 66 FR 66944. FRA proposed to conform to this language, particularly with respect to making reference to the terms ``discernable'' and ``significant'' to qualify the type of causation and aggravation, respectively. See definition of ``accident/incident'' and proposed reportability criteria at proposed Sec. 225.19(d).

The other part of the problem of determining whether an injury or illness is work-related is ``who decides.'' The Working Group proposed to adopt OSHA's final rule definition of ``most authoritative'' stated in OSHA's final rule. In the context of discussing how to determine whether or not a case is new, OSHA's final rule states,

If you receive recommendations from two or more physicians or other licensed health care professionals, you must make a decision as to which recommendation is the most authoritative (best documented, best reasoned, or most [persuasive]) and record the case based upon that recommendation.

29 CFR 1904.6(b)(3). (Note: the preamble to OSHA's final rule uses the word ``persuasive'' while the rule text uses the word ``authoritative'' where FRA put the word ``persuasive'' in brackets. FRA chose to use the language from the preamble, instead of that in the rule text, to avoid redundancy.)

The question of who is the ``most authoritative'' physician or other licensed health care professional arises in a number of contexts when there is a conflict of medical opinion. Conflicting medical opinions, often between an employee's physician and a railroad's company physician, arise regarding the following questions: whether an injury or illness is work-related; whether an employee needs days away from work (or days of restricted work) to recuperate from a work-related injury or illness, and if so, how many days; and whether a fatality is work-related, or arose from the operation of a railroad. FRA proposed to adopt in its Guide OSHA's definition in its Final Rule of ``most authoritative,'' and to adopt the language from the NAM-OSHA settlement agreement in order to resolve this issue. See also discussion of FRA review of work-relatedness determinations under section ``III.G.2.b.'' of the preamble.

Comments

Although no specific comments were received on this issue, a discussion occurred at the post-NPRM Working Group meeting, where representatives from AAR and TRE (Trinity Railway Express) expressed concern that FRA might adopt what they perceived as OSHA's position, namely, that work-relatedness was presumed in hearing loss cases unless the physician stated otherwise. After reviewing OSHA's final rule, FRA explained that although OSHA had originally proposed a presumption of work-relatedness, OSHA later determined that it was not appropriate to include this presumption in its final rule. See 67 FR 44045 (July 1, 2002). Consequently, OSHA decided that there are no special rules for determining work relationship with respect to hearing loss cases, rather the general approach would apply; thus, a hearing loss would be work-related ``if one or more events or exposures in the work environment either caused or contributed to the hearing loss, or significantly aggravated a pre-existing hearing loss.'' Id.

Final Rule/Decision

FRA has adopted its proposed policy concerning work-relatedness. However, based on the foregoing discussion of OSHA's rejection of the presumption of work-relatedness for hearing loss cases, Question and Answer No. 74 in the 2003 Guide has been amended to reflect OSHA's changed position.

4. Job Title versus Job Function

Proposal

An additional issue resolved by the Working Group was to propose amending the Guide's instructions for completing blocks 40-43 of FRA Form F6180.54 to make it clear that the job function of the employee, rather than the employee's job title, would be used to determine the employee's job title for reporting purposes when the railroad gives the employee a job title other than ``engineer,'' ``fireman,'' ``conductor,'' or ``brakeman.''

Comments and Final Rule/Decision

No specific comments were received. The amendments have been adopted as proposed.

5. ``Recording'' versus ``Reporting''

Proposal

Under OSHA's final rule, the term ``recording'' is used. Under FRA's regulations and Guide, the term ``reporting'' is used. Since FRA has always used the term ``reporting'' in its regulations and Guide, and since one of the statutes authorizing part 225 uses the term ``reporting,'' FRA proposed to continue to use the term ``reporting'' instead of ``recording.'' See 49 U.S.C. 20901(b)(1) (``In establishing or changing a monetary threshold for the reporting of a railroad accident or incident * * * .'')

Comments and Final Rule/Decision

No specific comments were received. FRA will continue to use the term ``reporting'' instead of ``recording'' as proposed.